

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 23-cv-0269 SRN/DTS

Jason George and Timothy Gillen, as Trustees of the Operating Engineers Local #49 Health and Welfare Fund and their successor(s); Jason George and Michael McNamara and their successors as Trustees of the Operating Engineers Local #49 Defined Contribution Plan; Joseph Shelton, and his successor(s) as a Fiduciary of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers; and Jason George and Jeffrey Carlson, and their successor(s) as Trustees of the Local #49 I.U.O.E. and Associated General Contractors of Minnesota Apprenticeship and Training Program,

Plaintiffs,

vs.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER FOR JUDGMENT**

Lakewest Excavating LLC and
Donald Condon,

Defendants.

This matter came before the Court for a hearing on Plaintiffs' Motion for Entry of Default Judgment [Doc. No. 25] on December 14, 2023. Amanda R. Cefalu, Esq., Reinhart Boerner Van Deuren, appeared on behalf of Plaintiffs. Defendants did not appear. Based upon all the filings in the record and arguments of counsel, the District Court makes the following findings:

FINDINGS OF FACT

1. Plaintiffs are trustees and fiduciaries of the above-captioned funds (hereinafter "Funds"). The Funds are multi-employer jointly trustee fringe benefit plans created and maintained pursuant to Sections 302(c)(5) and 302(c)(6) of the Labor Management Relations Act of 1947 ("LMRA"), as amended 29 U.S.C. §§ 186(c)(5), 186(c)(6). The Funds are administered in accordance with the provisions of the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. § 1001, *et seq.* ("ERISA").

2. Plaintiffs, and any subsequently appointed successors, are fiduciaries of the respective Funds under ERISA § 3(21), 29 U.S.C. § 1002(21).

3. Defendant Lakewest Excavating LLC is a Minnesota business corporation engaged in the construction business with a registered address of 14525 Highway 7, Suite 335, Minnetonka, MN 55435.

4. Defendant Donald Condon is an individual and the President or an officer, manager, and/or owner of Lakewest Excavating LLC who agreed to be personally liable to the Funds for unpaid fringe benefit contributions.

5. Defendants Lakewest Excavating LLC and Donald Condon are employers within the meaning of Section (3)(5) of ERISA, 29 U.S.C. § 1002(5).

6. Defendants are employers who agreed to be bound to collective bargaining agreements, specifically the Highway Heavy Agreement, with the International Union of Operating Engineers, Local No. 49. ("CBA").

7. The CBA requires, among other things, that signatory employers pay fringe benefit contributions to the Funds in accordance with the terms of the Funds. These

contributions must be made on behalf of all employees covered by the CBA for hours worked in amounts set forth and agreed upon therein, for the purpose of funding employees' benefits.

8. The CBA also provides that employers who are delinquent in their payments to any health and welfare, pension or other fringe benefit fund (i.e., to the Funds) will be subject to the collection procedures of the Funds, including the assessment of interest and liquidated damages from the date of delinquency, and costs and attorneys' fees, in accordance with the CBA and the trust agreement which govern the Funds.

9. The CBA and Trust Agreement require employers, such as Defendants, to contribute every month, not later than the fifteenth (15th) of the following month, such sums for pension, health and welfare coverage, and apprenticeship benefits, an amount for each hour worked by all employees covered by the CBA. Each payment shall be accompanied by a report form as specified by the Trustees and must be submitted to Wilson-McShane Corporation, 3001 Metro Drive, Suite 500, Bloomington, MN 55425, as the administrative agent designated by the Trustees.

10. The CBA, the Fund's Statement of Policy on Collections, and the applicable Trust Agreement(s) provide that a delinquent employer will be liable for unpaid contributions, liquidated damages in the amount of 15% of the unpaid contributions, reasonable attorneys' fees, interest in the amount of eight percent (8%) per annum, and other expenses incurred by the Plaintiffs incurred in taking action on the employer's delinquency.

11. Prior to the commencement of this lawsuit on February 2, 2023, Defendants had failed to submit the fringe fund remittance reports and payments for monthly contributions due and owing for hours worked by employees of Lakewest Excavating LLC during the period of September 2022 through January 2023.

12. After the Complaint in this action was filed and served upon Defendants, Defendant Lakewest Excavating LLC submitted the delinquent fringe fund remittance reports to the Funds for the period of September 2022 through August 2023, voluntarily disclosing the hours worked by covered employees during that period along with a partial payment for the contributions due for September 2022 hours and the contributions due to the Health Fund for October 2022 in the amount of \$12,960.03 (September 2022 contributions only) and \$12,879.72 (October 2022 Health Fund contributions only).

13. Pursuant to the remittance reports submitted by Defendants for the period of October 2022 through August 2023 (and crediting the payment for September and partially for October 2022), Defendants owe the Funds \$67,963.91 for fringe benefit contributions as a result of hours worked by covered employees during that period.

14. Pursuant to the remittance reports, Defendants are liable for \$14,070.54 in liquidated damages as provided for in the CBA for the period of September 2022 through August 2023 because these amounts were untimely paid or remain delinquent (\$1,944.00 for September 2022 contributions and \$12,126.54 for October 2022 through August 2023 contributions).

15. Defendant Lakewest Excavating LLC is liable to Plaintiffs in the amount of \$5,437.11 in interest on delinquent and unpaid fringe benefit contributions for the period of October 2022 through August 2023.

16. Pursuant to Defendants' remittance reports, Defendant Donald Condon is personally liable for \$26,281.21 of the fringe benefit contributions due and owing to the Health and Welfare Fund for the period of October 2022 through August 2023, \$5,874.14 in liquidated

damages, and \$2,102.50 in interest due and owing to the Health and Welfare Fund for the period of October 2022 through August 2023.

17. Although Defendants submitted the remittance reports and partial payments for September 2022 and October 2022 contributions, they did not submit payment in full for the outstanding fringe benefit contributions reported to be due and owing for the period of October 2022 through August 2023, did not pay the liquidated damages owed for September 2022, nor did they submit payment for the liquidated damages and interest due and owing pursuant to the reports through August 2023.

18. In total, and after crediting Defendant Lakewest Excavating LLC with the partial payments referenced above, Defendant Lakewest Excavating LLC is liable to the Plaintiffs in the amount of \$87,471.56 in total, consisting of \$67,963.91 in unpaid fringe benefit contributions for the period of October 2022 through August 2023, liquidated damages of \$14,070.54 (\$12,126.54 owed for October 2022 through August 2023 and \$1,944.00 for September 2022) and interest in the amount of \$5,437.11.

19. Pursuant to the Health and Welfare Fund's Participation Agreement Defendant Donald Condon is personally liable to Plaintiffs for \$26,281.21 in unpaid contributions, \$5,874.14 in liquidated damages of the total amount due and owing from the reports submitted to the Funds for the period of October 2022 through August 2023, and interest of \$2,102.50 and is therefore jointly and severally liable to Plaintiffs for \$34,257.85 of the total due.

20. The CBA and Trust Agreement provide that Plaintiffs are entitled to their reasonable attorney's fees and costs of this action.

21. To date, Plaintiffs have incurred \$5,307.30 in attorneys' fees and costs in connection with this matter and these proceedings. The requested attorneys' fees and costs are reasonable and necessary to prosecute the Funds' claims.

22. The Summons and Complaint were filed on February 2, 2023. Service was accomplished upon Defendants on February 21, 2023.

23. Defendants have failed to file and serve a response or answer to the Complaint. The Clerk's Entry of Default and an Amended Entry of Default for the Defendants were entered on October 25, 2023 and October 27, 2023 [Doc. Nos. 21, 23].

24. Defendants received notice of the instant motion and accompanying memorandum and exhibits, which were served by U.S. mail on November 1, 2023 [Doc. No. 31].

CONCLUSIONS OF LAW

1. Defendants Lakewest Excavating LLC and Donald Condon are in default, and Plaintiffs are entitled to entry of a default judgment.

2. Defendants have breached their obligation under the CBAs by failing to pay all contributions to the Funds found to be due and owing from the remittance reports submitted to the Funds by Defendants for the period of September 2022 (for liquidated damages) through August 2023 (contributions owing for October 2022 forward).

3. Defendant Lakewest Excavating LLC is liable to Plaintiffs, pursuant to 29 U.S.C. §1145 and §1132(g)(2) for unpaid fringe benefit contributions (\$67,963.91), liquidated damages (\$14,070.54) and interest (\$5,437.11) for the period of September 2022 through August 2023 based upon their remittance reports the total amount of \$87,471.56.

4. Defendant Donald Condon is liable to the Health and Welfare Fund for unpaid fringe benefit contributions (\$26,281.21), liquidated damages (\$5,875.14), and interest (\$2,102.50) for the period of October 2022 through August 2023 in the total amount of \$34,257.85.

5. Defendant Lakewest Excavating LLC is also liable to Plaintiffs in the amount of \$5,307.30 for reasonable attorneys' fees and costs to-date.

ORDER

1. That Plaintiffs' Motion for Entry of Default Judgment [Doc. No. 25] is **GRANTED**.

2. Plaintiffs are awarded \$5,307.30 for reasonable attorney's fees and costs pursuant to ERISA Section 515 and 502, 29 U.S.C. § 1145, 1132(9).

3. Judgment shall be entered in favor of Plaintiffs against Defendant Lakewest Excavating LLC in the total amount of \$87,471.56 for contributions, liquidated damages and interest, plus \$5,307.30 for attorney's fees and costs, for a total judgment of \$92,778.86.

4. Judgment shall be entered in favor of Plaintiffs against Defendant Donald Condon (jointly and severally with Lakewest Excavating LLC) in the amount of \$34,257.85.

LET JUDGMENT BE ENTERED ACCORDINGLY

Date: December 14, 2023

BY THE COURT



Susan Richard Nelson
United States District Judge